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3 **UNITED STATES DISTRICT COURT**  
4 **SOUTHERN DISTRICT OF CALIFORNIA**  
5

6 NICHOLAS KORMYLO, M.D.;  
7 KIMBERLY KORMYLO; BRYCE  
8 KORMYLO, by and through his guardian  
ad litem KIMBERLY KORMYLO,

9 Plaintiffs,

10 v.

11 FOREVER RESORTS, LLC dba  
12 CALVILLE BAY RESORT &  
13 MARINA; KENNETH WILLIAMS, and  
DOES 1-50,

14 Defendants.  
15

Case No.: 3:13-cv-0511-JM (WVG)

**ORDER GRANTING  
PLAINTIFFS' EX PARTE  
MOTION TO CONTINUE THE  
HEARING DATE FOR LEAVE  
TO FILE A THIRD-PARTY  
COMPLAINT**

16 On August 2, 2013, Defendant Forever Resorts LLC ("Forever Resorts")  
17 filed a motion for leave to file a third-party complaint against Scott Peterson  
18 Neeley. After missing their deadline to file an opposition to this motion, Plaintiffs  
19 requested relief to file an opposition to the motion for leave to file a third-party  
20 complaint on September 5, 2013. The court issued an order permitting Plaintiffs to  
21 file an opposition to Defendant's motion for leave by September 6, 2013, and  
22 Plaintiffs filed a response to the motion by the new deadline. For the following  
23 reasons, the court grants Forever Resorts' motion for leave to file a third-party  
complaint.

## II. LEGAL STANDARD

Federal Rule Civil Procedure (“Rule”) 14 provides that “[a] defending party may, as third-party plaintiff, serve a summons and complaint on a nonparty who is or may be liable to it for all or part of the claim against it.” Fed. R. Civ. P. 14(a)(1). “The decision whether to implead a third party defendant is within the sound discretion of the district court.” Southwest Administrators, Inc. V. Rozay’s Transfer, 791 F.2d 769, 777 (9th Cir. 1986). Courts consider the following factors when ruling on a motion for leave to file a third-party complaint: (a) prejudice to the original plaintiff; (b) complication of issues at trial; (c) likelihood of trial delay; and (d) timeliness of the motion to implead. See Irwin v. Mascott, 94 F. Supp. 2d 1052, 1056 (N.D. Cal. 2000).

## III. DISCUSSION

Forever Resorts argues that Defendant Kenneth Williams has already filed a third-party complaint against Neeley, who allegedly operated the vehicle that negligently struck Kormylo. See Motion for Leave to File a Third-Party Complaint (“MLTP”) at 3. Forever Resorts further contends that “[t]his third-party complaint against Neeley . . . fulfills the fundamental purpose of Rule 14 as it presents ‘a possible scenario under which the third party defendant may be liable for some or all of the defendant’s liability to plaintiff.’” MLTP at 4.

Plaintiff counters that the motion for leave to file a third party complaint should be denied for two reasons: “(1) [t]he proposed complaint does not allege derivative liability but rather tries to shift the blame entirely to Neeley; and (2) Forever Resorts cannot state a valid claim against Neeley because its allegations are demonstrably wrong.” Opp. MLTP at 1. Plaintiffs argue that “a third-party claim may be asserted only when the third party’s liability is in some way

1 dependent on the outcome of the main claim and the third party's liability is  
2 secondary or derivative." United States v. One 1977 Mercedes Benz, 708 F.2d  
3 444, 452 (9th Cir. 1983). Plaintiff argues that Forever Resorts is "alleging that  
4 Neeley is the sole and independent cause of Dr. Kormylo's horrific injuries." Opp.  
5 MLTP at 4. As Forever Resorts is attempting to foist all liability on Neeley,  
6 Plaintiffs contend that permitting Forever Resorts to file a third-party complaint is  
7 not proper under Rule 14. See, e.g., Stewart v. Am. Int'l Oil & Gas Co., 845 F.2d  
8 196, 199-200 (9th Cir. 1988) (finding that there was no derivative nor secondary  
9 liability involved as required by Rule 14); St. Thomas v. Harrisburg Hosp., 108  
10 F.R.D. 2, 4 (M.D. Pa. 1985) (denying defendants' request to join a third-party  
11 defendant, but permitting defendants to defend the action by asserting his  
responsibilities).

12 Plaintiff also argues that "[a] motion for leave to file a third party complaint  
13 should be denied where the complaint does not set forth a viable claim for relief."  
14 Opp. MLTP at 5 (citing Irwin v. Mascott, 94 F. Supp. 2d 1052, 1057-58 (N.D. Cal.  
15 2000) ("It makes no sense to permit such a potentially prejudicial expansion of the  
16 case at the expense of Plaintiffs, if the third-party plaintiffs do not have a valid  
17 theory of relief against the third-party defendants.")). Plaintiff further argues that  
18 "[a]llowing Forever Resorts to implead on behalf of Dr. Kormylo's traveling  
19 partners and friends, when his liability cannot be established, would accomplish  
nothing other than harassing Neeley, and, indirectly, plaintiff." Opp. MLTP at 5-6.

20 The court concludes that Forever Resorts should be granted leave to file a  
21 third-party complaint. The third party would not complicate issues at trial or cause  
22 undue delay because a similar third-party complaint has already been filed against  
23 the same third-party defendant by the other defendant, Kenneth Williams, along

1 with his answer on August 2, 2013. The case was filed a little over six months ago  
2 and discovery has not yet commenced, rendering the request timely in context. A  
3 separate action concerning Neeley's liability to Forever Resorts alone would be  
4 repetitive and waste the court's valuable resources.

5 The court finds Plaintiffs' arguments concerning secondary or derivative  
6 liability unpersuasive as "[i]mpleader is commonly used for claims against a third  
7 party for indemnification, subrogation, breach of warranty, or contribution among  
8 joint tortfeasors." Teruya v. Shaw, 2012 U.S. Dist. LEXIS 112853, at \*12 (D.  
9 Haw. 2012). Indeed, "[t]he crucial characteristic of a Rule 14 claim is that  
10 defendant is attempting to transfer to the third-party defendant the liability asserted  
11 against him by the original plaintiff." Stewart v. Am. Int'l Oil & Gas Co., 845  
12 F.2d 196, 200 (9th Cir. 1988). In addition, the cases cited by Plaintiffs were  
13 instances in which no third-party complaint had been previously filed and are  
therefore distinguishable from the matter at hand.

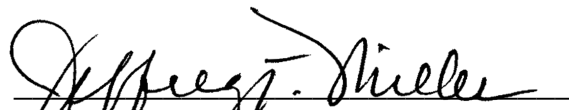
14 Finally, the court finds that Plaintiffs' arguments concerning the validity of  
15 the claim are better addressed in a fully briefed motion to dismiss.

#### 16 **IV. CONCLUSION**

17 The court grants Forever Resorts' motion for leave to file a third-party  
18 complaint without prejudice to further challenge the complaint should  
circumstances warrant.

19 **IT IS SO ORDERED.**

20 DATED: September 13, 2013

21   
22 **Jeffrey T. Miller**  
23 **United States District Judge**